IN THE SUPREME COURT OF THE UNITED STATES

AUGUST SPECIAL TERM 1958

JOHN AARON, et al., PETITIONERS

v.

WILLIAM G. COOPER, et al.,
Members of the Board of Directors of
the Little Rock, Arkansas Independent
School District, and
VIRGIL T. BLOSSOM, Superintendent of
Schools RESPONDENTS

ON APPLICATION FOR VACATION OF THE ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT STAYING THE EXECUTION OF ITS MANDATE AND FOR A STAY OF THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS OF JUNE 21, 1958

BRIEF OF J. W. FULBRIGHT AS AMICUS CURIAE

Lee Williams
409 Senate Office Building
Washington 25, D. C.
Attorney for Amicus Curiae

August 27, 1958

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BRIEF OF J. W. FULBRIGHT AMICUS CURIAE

It is not the purpose here to burden the record of this Court by a lengthy repetition of the facts or the legal principles developed by the attorneys for the Respondents and in the opinions of the lower Courts. The indulgence of this Court is respectfully asked to hear an individual who is deeply troubled for the future peace and happiness of the people of Arkansas and of this nation, of all races and all creeds.

Special indulgence of this Court is requested to the arguments herein set forth, not because I am a legal expert or a social scientist, but simply because for more than fifty years, I have lived among the people of Arkansas, and for more than fifteen years, I have represented them in the Congress of the United States, from which experience I claim some intimate knowledge of local conditions

and of the mental and spiritual landscape against which the people of Arkansas live and move.

The people of Arkansas are as law abiding, as respectful of the traditions of our Anglo-Saxon heritage as are their fellow Americans; they abhor anarchy and disorder. In truth, until the recent violence, it had been thirty years since racial disorder had troubled the people of Arkansas.

From the complete destruction of their economy during the War between the States, the people of Arkansas have slowly rebuilt their fortunes and their standing in the Nation. It may be that they are more sensitive to criticism than is the average American.

By way of emphasis, I call the attention of this Court to certain considerations involved in the pending matter.

This Court has said the "Constitutional principle" involved in the decision of Brown v. Board of Education, 347 U.S. 483 (1954), "may require solution of varied local school problems." "... courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions ... the courts which originally heard these cases can best perform this judicial appraisal." Brown v. Board of Education, 349 U.S. 294, 299 (1955).

The Court directed that the district courts should be guided by equitable principles, which, it said, traditionally had been "characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." Id. at 300.

Judge Harry J. Lemley of the Federal District Court for the Eastern District of Arkansas is the Judge who is, in the words of the Court, in proximity to local conditions and he has found positively and unequivocally that the Little Rock School Board has in good faith attempted to comply with the rulings of this Court in the Brown decisions, Brown v. Board of Education, supra, but that conditions are so chaotic that a delay should be granted the Little Rock School Board in order to enable calmer spirits to find a way to conform to the principles enunciated by this Court.

A review of the decisions of Judge Lemley and the Eighth Circuit Court of Appeals leaves little doubt that the educational processes at Central High School were disrupted to an incalculable extent notwithstanding the good faith efforts of the School Board to comply with this court's general rule in the first Brown decision. See Aaron v. Cooper, Civil No. 3113, D. Ark., June 20, 1958; Aaron v. Cooper, Civil No. _____, 8th Cir., August 18, 1958.

Judge Lemley, in his attempt to interpret and carry out the mandate of this Court in the second Brown decision, determined that these disruptive conditions were intolerable. The Circuit Court of Appeals did not deny this. Indeed, the opinion of the court seems to reinforce it. In summarizing the eleven events of the school year, the court said that, in general, "there was bedlam and turmoil in and upon the school premises, outside of the classrooms." Aaron v. Cooper, Civil No. _____, 8th Cir., August 18, 1958. The court elsewhere, and in general, conceded that the normal educational processes were disturbed.

This Court in the first Brown decision, 347 U.S. 483 at 493, observed that "education is perhaps the most important function of state and local governments." If this is true, then is not the primary duty of the School Board that of providing proper public education? What more can the Board do than that which it has done, that is, to attempt in good faith to provide that which it is its duty to provide, and which it cannot do under these circumstances?

The Circuit Court of Appeals in its decision washed its hands of this question -- that is, how white and Negro children can be accorded public education in compliance with this Court's ruling in the first Brown decision, without "bedlam and turmoil."

"It is not the province of this Court," said the Circuit Court of Appeals, "... to advise the Board as to the means of implementing integration in the Little Rock Schools." Aaron v. Cooper, 8th Cir., supra. Whose province is it? Is it not the province of equity, to which this Court was committed by the second Brown decision, to adapt its statement of constitutional principles to the purposes, functions, and abilities of the institution to which those principles are suddenly to apply -- that is, the public school systems of the South?

What, indeed, is the purpose of entrusting equitable jurisdiction to local federal district courts, if it is not to permit an appraisal of what can be done to comply with the orders of this Court in the light of good faith efforts of local school boards?

The Circuit Court gave no answer to this dilemma.

"Mindful as we are that the incidents which occurred within Central High School produced a situation which adversely affected normal educational processes, we nevertheless are compelled to hold that such incidents are insufficient to constitute a legal basis for suspension of the plan to integrate. . . To hold otherwise would result in accession to the demands of insurrectionists or rioters." Aaron v. Cooper, 8th Cir., supra.

While this statement, which surely is the essence of the decision, has validity as a general rule, how can it be adapted as pointing a way out of the dilemma of the School Board? What guidance does it give to those who wish to abide by their duty to furnish adequate educational opportunities without defying this Court? Of what value is equitable jurisdiction if it cannot adapt the otherwise immutable law to the needs of the parties, the particular circumstances and the function of the institutions affected. This last, it should be remembered, is to provide adequate public education.

I suggest that the Circuit Court of Appeals was unduly preoccupied by the violent and unlawful acts of individual citizens and failed to give proper weight to the equitable nature of the proceeding and to the further fact that there was involved not simply the violence of individual citizens, but, in the words of an eminent commentator and historian, "a conflict between two sovereignties -- between the State government and the Federal Government." Washington Post and Times Herald, Aug. 26, 1958, p A13, Col. 3.

I believe it is true that this conflict "poses problems which go far beyond, and are quite different from, the problems of dealing with lawless mobs. They are problems which are insoluble by exhortation, or by Federal injunction and law suits in the Federal courts. For the essential issue is the refusal of lawful state governments to accept the validity of a Federal law." Ibid.

Chief Judge Archibald K. Gardner, of the Eighth Circuit Court of Appeals, in his dissenting memorandum observed that "the action of Judge Lemley was based on realities, and on conditions rather than theories." Aaron v. Cooper, 8th Cir., supra.

The meaningful realities of this situation are that due to unexpected developments of an unprecedented nature, this Court's original objective of procuring for Negro children education on an integrated basis cannot be provided under existing circumstances. Time is desperately needed to enable the authorities concerned to find an adjustment of this conflict.

No decision which this Court can make will assure the rights of the Negro children more effectively than those decisions which it has heretofore rendered. In spite of the full force of the executive power of the Federal government, even the use of the armed forces of the United States, the children did not and cannot enjoy a better, not even as good an, opportunity for education under the conditions of turmoil and bedlam which result from such extreme measures. The education of all children, white and Negro, suffers from such disturbed, abnormal conditions.

The argument that to accept the decision of the District Court for a delay of 2 1/2 years, is an abandonment of the integration decision of this Court is without merit. Such an argument takes no

account of the difference between the enunciation of constitutional doctrine, and the application of that doctrine through the principles of equity. More importantly, it takes no account of the obligation of the courts to adapt their powers to the purposes for which the institution or activity affected by those powers exists. This Court has stated, "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." Virginian Railway Co. v. Federation, 300 U. S. 515, 552 (1937).

It has become an axiom that the processes of education -- and in this country - public education -- offer the solution, if any is to be found, whereby men of different races may learn to abide one another, each in the full enjoyment of his rights. If this is agreed, then the systems of education must be respected, and social experimentation in them made tolerable to their purposes.

If I may repeat, this Court has observed that public education is the most important function of State and local government. Brown v. Board of Education, 347 U. S. 483, 493. To the extent that the school systems are successful, it is because local school boards, administrators, and teachers make them so. In this controversy, they are acknowledged to be men of good will. But if they

are not supported by the courts, when acting in good faith, how can men of good will be expected to continue to function? It can be expected that the control of local school boards will fall into the hands of radicals and fanatics. Then neither the processes of justice nor education would be served.

The Circuit Court of Appeals, in its opinion, had much to say about the activities of persons and governments outside this case. While these forces may be a part of the history of the case, and even if the Court deems them responsible for the present circumstances, neither their recollection, nor the courts despair of them, afford the School Board any solution to the problem of how to conduct public education in an acknowledged atmosphere of bedlam, and turmoil. The Court's refusal to support the good faith position of the Board can only intensify the effect of those outside forces. And, at least for the present, they are beyond the reach of this Court.

The Chief Judge of the Eighth Circuit Court of Appeals, in a passage of profound wisdom, said, "For centuries there had been no intimate social relations between the white and colored races in the section referred to as the South. There had been no integration in the schools and that practice had the sanction of a decision of the Supreme Court of the United States as constitutionally legal. It had become a way of life in that section of the country and it is not strange that this long-established,

cherished practice could not suddenly be changed without resistance. Such changes, if successful, are usually accomplished by evolution rather than revolution, and time, patience, and forebearance are important elements in effecting all radical changes." Aaron v. Cooper, 8th Cir., supra (dissenting memorandum).

That former Justice Brandeis of this Court would have agreed with the reasoning of Judge Gardner is evident from his statement in Goldman, The Words of Justice Brandeis, (1952) at p. 116: "No law can be effective which does not take into consideration the conditions of the community for which it is designed; no law can be a good law -- every law must be a bad law -- that remains unenforced."

The failure of the majority of the Circuit Court to take note of these truths in Judge Gardner's dissenting opinion, suggests that the members of the Court are not familiar with the traditions, the cultural patterns, the way of life of our Southern States. Indeed it seems clear that implicit in this whole matter is a tragic misunderstanding of fundamental human instincts and impulses.

The people of Arkansas endure against a background not without certain pathological aspects. They are marked in some ways by a strange disproportion inherited from the age of Negro slavery. The whites and Negroes of Arkansas are equally prisoners

of their environment. No one knows what either of them might have been under other circumstances. Certainly, no one of them has ever been free with respect to racial relationships in the sense that the Vermonter, say, has been free. The society of each is conditioned by the other's presence. Each carries a catalogue of Things Not To Be Mentioned. Each moves through an intricate ritual of evasions, of make-believe, and suppressions. In Arkansas, one finds a relationship among men without counterpart on this continent, except in similar Southern states. All this is the legacy of an ancient and melancholy history.

Under the circumstances, it is inevitable that there should have come into being what one might call a "Southern mind." And it is a grave error, it seems to me, to fail to realize that there is a Southern mind. G. M. Young, the English historian, observed that it was dangerous for Victorian England to fail to see that "time and circumstance had created an Irish mind;" and it was also dangerous to fail to learn "the idiom in which that mind ... expressed itself: and to understand that "what we could never remember, Ireland could never forget."

History tells us that race memories long endure. They are perpetuated in myths, and monuments, and a mother's lullaby. They are sentimental and emotional and when stirred up, they become irrational.

We are confronted here with a problem, novel and unprecedented in the history of our country and extraordinarily complex. In our congenital optimism, we Americans believe, or affect to believe, that social questions of the greatest difficulty may be solved through the discovery and application of a sovereign remedy that will forever dispose of the problem. Yet all this flies in the face of human experience. Thus, for example, a so-called Jewish problem has endured for more than 2000 years. The Roman Catholic-Protestant problem has similarly endured since the Reformation, and one might add that the Islam-Christian problem and the Hindu-Muslim problem, among many others, plague various groups of men in this and in other countries. Millions of lives have been sacrificed to these "problems" and the end is not yet.

I would suggest, then, that the problem of school integration in Arkansas is more likely -- bearing in mind that flesh and blood is weak and frail -- to yield to the slow conversion of the human heart than to remedies of a more urgent nature.

In this general context, we must observe a constant in the affairs of men. It is this: When their ancient social convictions are profoundly violated, or when sudden change is attempted to be imposed upon attitudes or principles deeply imbedded within them by inheritance, tradition, or environment, they are likely to react almost as by involuntary reflex, and often violently.

These reflections and the inferences which may be drawn therefrom, at least as they pertain to the problem which presently confronts this Court, recall to mind the words of a profound scholar, Morris R. Cohen, who wrote as follows:

"The clericalist and the legalist have an undue advantage in identifying their causes with those of religion and law, causes for which humanity is always willing to make extreme sacrifices. But that the identity is not complete is seen clearly in the career of Jesus of Nazareth. In the days of Jesus, both clericalism and legalism were represented by the Pharisees, who carried the legalist idea into religion, and wished to control all life by minute regulations similar to those which governed the life of the High-Priest. To make the life of every individual as holy as that of the High-Priest was indeed a noble ideal. Yet it was also deadening through the mass of casuistry to which it gave rise. Jesus's protest that the Sabbath was made for man, not man for the Sabbath, cuts the foundation of all legalism and clericalism. It makes us see the profound foolishness of those who, like Cato, would adhere to the law even though the Republic be thereby destroyed. Without a legal order and some ministry of religious insight, the path to anarchy and worldliness is indeed dangerously shortened. But without a realization of the essential limitations of legalism and clericalism, there is no way of defending the free human or spiritual life from fanaticism and superstition."

M. R. Cohen, Law and the Social Order; Essays in Legal Philosophy, p. 160-161 (1933).

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103

For the reasons herein set forth, it is urged that this Court deny the application of Petitioners.

Respectfully submitted,

Lee Williams
Attorney for J. W. Fulbright
409, Senate Office Building
Washington, D. C.

August 27, 1958